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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION
10

11 ROBERT PRITIKIN, et al.,
12 Plaintiffs,
13 v.
14 COMERICA BANK, et al.,
15 Defendants.
16

CASE NO. CV 09-03303 JF

**COMERICA'S RESPONSE TO
PLAINTIFFS' OBJECTION AND MOTION
TO STRIKE THE DECLARATION OF
MONIQUE JEWETT-BREWSTER**

Date: October 30, 2009
Time: 9:00 a.m.
Dept.: Honorable Jeremy Fogel

17 Defendant Comerica Bank hereby responds to Plaintiffs' Objection and Motion to Strike
18 the Declaration of Monique Jewett-Brewster as follows.

19 **A. The Matters Addressed in the Declaration Are Judicially Noticeable**

20 The matters that were the subject of Ms. Jewett-Brewster's declaration, e.g., the existence
21 and function of Section 341(a) creditors' meetings, the creation of transcripts from those
22 meetings, the rules and procedures of the United States Trustee regarding the maintenance of
23 those transcripts, and the function of Rule 2004 examinations, are all matters of which this Court
24 may take judicial notice. So, too, is the fact that documents get lost, and memories fade, eight to
25 ten years after the relevant events occurred.

26 In addition to the matters set forth in the Complaint, the Court may consider matters that
27 are judicially noticeable in ruling on a motion to dismiss under Rule 12(b)(6). *See, In re Silicon*
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1 *Graphics, Inc. Sec. Lit.*, 183 F.3d 970, 986 (9th Cir. 1999); *Emrich v. Touche Ross & Co.*, 846
 2 F.2d 1190, 1198 (9th Cir. 1988). Although the declaration was not incorporated into Comerica's
 3 separately-filed Request for Judicial Notice, the Court may take judicial notice of matters
 4 "whether requested or not." Federal Rule of Evidence 201(c). The judicially noticeable facts,
 5 procedures, and discovery mechanisms referenced in Ms. Jewett-Brewster's declaration all tend
 6 to support the prejudice suffered by Comerica as a consequence of Plaintiffs' failure to file their
 7 Complaint within the applicable limitations period.

8 **B. Responses to Objections to Testimony**

9 1. Page 2, lines 19-21, and page 3, lines 2-6:¹ The identified testimony is not
 10 hearsay, as Ms. Jewett-Brewster is simply testifying regarding her own personal knowledge and
 11 understanding of the record keeping policies of the United States Trustee. The testimony is
 12 directly relevant to the issue of prejudice to Comerica, a matter that was placed in issue by
 13 Plaintiffs' invocation of the doctrine of equitable tolling to justify the untimely filing of their
 14 Complaint. *See*, Reply Brief at Section II.D.2, which is incorporated by reference herein. The
 15 fact that the testimony supports the position of one party over the other is not a valid basis for
 16 objecting to the testimony under Federal Rule of Evidence 403; there is nothing prejudicial or
 17 inherently confusing about it. Further, Plaintiffs' reliance upon *Supermail Cargo Inc. v. United*
 18 *States*, 68 F.3d 1204, 1207 (9th Cir. 1995) for the proposition that a motion to dismiss should not
 19 be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts to support
 20 his or her claim" is misplaced, in light of the fact that the quoted standard was explicitly
 21 overruled by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007)
 22 ("[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement.")

23 2. Page 2, line 26, through page 3, line 1: The cited testimony is not hearsay,
 24 as it is based upon Ms. Jewett-Brewster's personal knowledge of the purpose of the telephone call
 25 referenced in the declaration. The existence of a 341(a) meeting of creditors is established by the
 26 Notice of Rescheduling of First Meeting of Creditors filed April 12, 2004 in *In re Four Star*

27 ¹ It appears that the Plaintiffs have cited to the physical page of the Declaration, as opposed to the
 28 number at the bottom of the page. Thus, the citation to "page 2, lines 19-21" is actually referring
 to the page enumerated as "page 1" in the Declaration.

1 *Financial Services, LLC*, United States Bankruptcy Court, Central District of California Case No.
 2 LA 03-37579, a true and correct copy of which was attached as Exhibit 16 to Comerica's RJN.

3 3. Page 2, lines 10-28: For the reasons set forth in Comerica's moving papers
 4 and Reply Brief, the availability of information regarding Four Star's bankruptcy, and the ability
 5 of creditors to obtain Four Star records through discovery devices available in the context of that
 6 bankruptcy, are both directly relevant to the issues of when Plaintiffs had notice or information of
 7 circumstances to put a reasonable person on inquiry of wrongdoing, and whether they exercised
 8 reasonable diligence in pursuing their claims. Further, as explained in *Norgart v. The Upjohn*
 9 *Company*, 21 Cal.4th 383, 398-399 (1999), "the identity of the defendant is not an element of any
 10 cause of action." *Id.* "It follows that failure to discover, or have reason to discover, the identity of
 11 the defendant does not postpone the accrual of a cause of action, whereas a like failure
 12 concerning the cause of action itself does." *Id.* (emphasis added). The rationale for
 13 distinguishing between a plaintiff's ignorance of the defendant and ignorance of the cause of
 14 action itself is based "on the commonsense assumption that once the plaintiff is aware of the
 15 latter, he normally has sufficient opportunity within the applicable limitations period to discover
 16 the identity of the former. He may often effectively extend the limitations period in question by
 17 the filing and amendment of a Doe complaint and invocation of the relation-back doctrine.
 18 Where he knows the identity of at least one defendant, *he must proceed thus.*" *Id.* (emphasis
 19 added, internal quotes and citations omitted).

20 The case of *Prudential Home Mortgage Co. v. Superior Court*, 66 Cal.App.4th 1236,
 21 1248 (1998) is distinguishable on the grounds explained in Comerica's Reply Brief.

22 Finally, the fact that the cited testimony of Ms. Jewett-Brewster supports one party's
 23 position and does not support the other does not serve as a basis for excluding it under Federal
 24 Rule of Evidence 403. The reference testimony is neither prejudicial nor inherently confusing.

1 DATED: October 16, 2009

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COMERICA BANK
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